

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TERRY LEWIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Civil No. 13cv3161-LAB (WMc)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

On September 25, 2013, Petitioner Terry Lewis, a state prisoner proceeding pro se, submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 to the Ninth Circuit Court of Appeals. (ECF No. 1.) On December 23, 2013, the Petition was transferred to this Court. (ECF No. 2.) The Petition is subject to dismissal because Petitioner has failed to pay the \$5.00 filing fee or move to proceed in forma pauperis, has failed to name a proper respondent, and has failed to allege exhaustion of state court remedies.¹

FILING FEE REQUIREMENT

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See

¹ Petitioner challenged the same conviction in a federal habeas petition in this Court in So. Dist. Ca. Civil Case No. 00cv2033-IEG (NLS). Because that action was dismissed for failure to allege exhaustion of state court remedies (see id. Doc. No. 29 at 6), the instant Petition does not appear to be considered second or successive within the meaning of 28 U.S.C. § 2244(b)(3)(A). In re Turner, 101 F.3d 1323, 1323 (9th Cir. 1996).

1 Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit,
 2 **no later than March 3, 2014**, the \$5.00 fee or adequate proof of his inability to pay the fee.

3 **FAILURE TO NAME PROPER RESPONDENT**

4 Review of the Petition reveals that Petitioner has failed to name a proper respondent. On
 5 federal habeas, a state prisoner must name the state officer having custody of him as the
 6 respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28
 7 U.S.C. foll. § 2254). “Typically, that person is the warden of the facility in which the petitioner
 8 is incarcerated.” Id. Federal courts lack personal jurisdiction when a habeas petition fails to
 9 name a proper respondent. See id.

10 The warden is the typical respondent. However, “the rules following section 2254 do not
 11 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
 12 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
 13 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
 14 petitioner is in custody due to the state action he [or she] is challenging, ‘[t]he named respondent
 15 shall be the state officer who has official custody of the petitioner (for example, the warden of
 16 the prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

17 Here, Petitioner has incorrectly named “State of California,” as Respondent. A long
 18 standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus
 19 against the State under . . . [whose] authority . . . the petitioner is in custody. The actual person
 20 who is [the] custodian [of the petitioner] must be the respondent.” Ashley v. Washington, 394
 21 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon
 22 the custodian of the state prisoner, the person who will produce “the body” if directed to do so
 23 by the Court. “Both the warden of a California prison and the Director of Corrections for
 24 California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d at 895. In order
 25 for this Court to entertain the Petition filed in this action, Petitioner must name the warden in
 26 charge of the state correctional facility in which Petitioner is presently confined or the Director
 27 of the California Department of Corrections. Brittingham v. United States, 982 F.2d 378, 379
 28 (9th Cir. 1992) (per curiam).

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” Id. at 366 (emphasis added).

Here, Petitioner has not indicated that he has exhausted state judicial remedies. Nowhere in the Petition does Petitioner allege that he raised his claim in the California Supreme Court. The burden of pleading that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

The statute of limitations does not run while a properly filed state habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by the appropriate court officer for placement into the record] are in compliance with the applicable laws and rules governing filings.”). However, absent some other basis for tolling, the statute of limitations does run while a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas relief because he has not satisfied the filing fee requirement, has not named a proper Respondent, and has not alleged exhaustion of state court remedies.

CONCLUSION

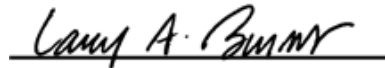
Based on the foregoing, the Court **DISMISSES** this action without prejudice because Petitioner has failed to satisfy the filing fee requirement, failed to name a proper respondent, and failed to allege exhaustion of state judicial remedies. To have this case reopened, Petitioner must file a First Amended Petition no later than **March 3, 2014**, that cures the pleading deficiencies set forth above. The Clerk of Court shall send a blank Southern District of California amended petition form and a blank Southern District of California in forma pauperis application to Petitioner along with a copy of this Order.

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1 Further, Petitioner is advised that if he has not alleged exhaustion of his state court
2 remedies before **March 3, 2014**, and he still wishes to pursue his claim in this Court in a habeas
3 action, he will have to start over by filing a completely new habeas petition in this Court. See
4 Turner, 101 F.3d at 1323.

5 **IT IS SO ORDERED.**

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7 DATED: January 3, 2014

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9 HONORABLE LARRY ALAN **BURNS**
10 **United States District Judge**
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